06-CV-01129-CMP

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AUG 09 2006

AT SEATTLE CLERK U.S. DISTRICT COURT WESTERN DISTRICT OF WASHINGTON

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

OMNI INNOVATIONS, LLC, a Washington limited liability company; and JAMES S. GORDON JR., a married individual dba GORDONWORKS.COM,

Plaintiffs,

v.

SMARTBARGAINS.COM, LP, a Delaware Limited Partnership; JOHN A. KERNEY and his marital community with JANE DOE KERNEY; and ALAN R. GOLDSTEIN and his marital community with JANE DOE GOLDSTEIN,

Defendants.

No. CV06-1129JCC

COMPLAINT

JURY DEMANDED

PARTIES, JURISDICTION, VENUE

1. Plaintiff OMNI INNOVATIONS, LLC, (hereinafter "OMNI") is a Washington limited liability company duly licensed and registered with the State of Washington, with its principal place of business in Franklin County, Washington.

2. Plaintiff JAMES S. GORDON JR. dba GORDONWORKS.COM (hereinafter "GORDON") is a married individual residing in Franklin County, Washington.

3. On information and belief, plaintiffs allege that Defendant SMARTBARGAINS.COM, LP, is a Delaware limited partnership with its principal place of business in Boston, Massachusetts.

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4. On information and belief, plaintiffs allege that Defendant JOHN A. KERNEY and Defendant ALAN R. GOLDSTEIN are officers, directors, managers, general partners, and/or other members of the control group of Defendant SMARTBARGAINS.COM, LP; that each of them are married, and that each act and omission alleged herein of each Defendant was for the benefit of his marital community.

5. Jurisdiction is proper pursuant to 28 U.S.C. §1331 (federal question) and 28 U.S.C. §1332 (diversity).

6. This Court has supplemental jurisdiction of state law claims pursuant to 28 U.S.C. §1367.

7. Venue is proper pursuant to 28 U.S.C. §1391

FACTS

8. From at least August 2003 through May 2005, Plaintiff GORDON, doing business as GORDONWORKS.COM, provided and enabled computer access for multiple users to a computer server that provides access to the Internet.

9. From and after May 2005, Plaintiff OMNI provided and enabled computer access for multiple users to a computer server that provides access to the Internet.

10. The domain names served by Plaintiffs or one of Plaintiffs include: anthonycentral.com, chiefmusician.net, ehahome.com, itdidnotendright.com, jammtomm.com, jaycelia.com, celiajay.com, jaykaysplace.com, and gordonworks.com (collectively the "Domains" and individually and generically a "Domain").

11. At all times material hereto, for the Domains and each of them, the information that all e-mail addresses at each Domain (the "Recipient Addresses") belong to Washington residents was and is available upon request from the registrant of each Domain. Each registrant is a Washington resident and each Domain is registered with a Washington address

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12. During the time period of approximately August 2003 through May 2006, Plaintiffs received at the Domains 4506 electronic-mail messages (collectively the "E-mails" or individually and generically as an "E-mail").

13. The E-mails, and each of them, were received by Plaintiffs' server serving the Domains.

14. Each of the E-mails misrepresents or obscures information in identifying the point of origin or the transmission path thereof, and contain header information that is materially false or materially misleading. The misrepresentations include without limitation: IP address and host name information do not match, or are missing or false, in the "from" and "by" tokens in the Received header field; and dates and times of transmission are deleted or obscured.

15. On information and belief, Plaintiffs allege that some of the E-mails used the Internet domain name of a third party or third parties without permission of that third party or those third parties.

16. Defendant SMARTBARGAINS.COM, LP, initiated the transmission of the E-mails, and each of them. In the alternative, Defendant SMARTBARGAINS.COM, LP, conspired or otherwise acted in collusion with another or others or assisted another or others to transmit the E-mails, and each of them.

17. Defendant JOHN A. KERNEY and Defendant ALAN R. GOLDSTEIN are the officers, directors, managers, general partners, and/or other members of the control group of Defendant SMARTBARGAINS.COM, LP.

18. Defendant JOHN A. KERNEY and Defendant ALAN R. GOLDSTEIN, and each of them, directed or otherwise actively participated in the conduct of Defendant SMARTBARGAINS.COM, LP, that is, sending or causing to be sent electronic-mail messages in violation of federal and state law all as described herein, including without limitation the E-mails described above; or, in the alternative, Defendant JOHN A.

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KERNEY and Defendant ALAN R. GOLDSTEIN, and each of them, with full knowledge approved of or acquiesced in the conduct of Defendant SMARTBARGAINS.COM, LP, that is, sending or causing to be sent electronic-mail messages in violation of federal and state law all as described herein, including without limitation the E-mails described above.

19. At all times material hereto, Defendants, and each of them, knew or had reason to know that the Recipient Addresses, and each of them, were and are held by Washington residents.

FIRST CAUSE OF ACTION – CAN-SPAM ACT

15 U.S.C. §7701 et seq.

20. On the basis of the facts set forth hereinabove, Defendant SMARTBARGAINS.COM, LP, initiated the transmission of the E-mails, and each of them, to a protected computer in violation of 15 U.S.C. §7704(a), causing damage to Plaintiffs GORDON and OMNI as the providers of Internet access service receiving each such E-mail, in the amount of $100 for each such E-mail, as provided in 15 U.S.C. §7706(g)(3).

21. Defendant SMARTBARGAINS.COM, LP, did willfully and knowingly so act in violation of the provisions of 15 U.S.C. §7701 et seq.

SECOND CAUSE OF ACTION – CEMA

RCW 19.190.010 - .070

22. On the basis of the facts set forth hereinabove, Defendant SMARTBARGAINS.COM, LP, initiated, conspired with another to initiate, or assisted the transmission of the E-mails, and each of them, in violation of RCW 19.190.020, causing damage to Plaintiffs GORDON and OMNI as the interactive computer service receiving each such E-mail in the amount of $1,000 for each such E-mail, as provided in RCW 19.190.040(2).

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THIRD CAUSE OF ACTION - CONSUMER PROTECTION ACT

Ch. 19.86 RCW

23. On the basis of the facts set forth hereinabove, Defendant SMARTBARGAINS.COM, LP, initiated the E-mails, and each of them, in violation of RCW 19.190.030 and Chapter 19.86 RCW, causing damage to Plaintiffs GORDON and OMNI as the interactive computer service receiving each such E-mail in the amount of $1,000 for each such E-mail, as provided in RCW 19.190.040(2).

OFFICER AND DIRECTOR LIABILITY FOR CORPORATE ACTS

24. On the basis of the facts set forth hereinabove, Defendant JOHN A. KERNEY and Defendant ALAN R. GOLDSTEIN, and each of them, as the officers, directors, managers, general partners, and/or other members of the control group of Defendant SMARTBARGAINS.COM, LP, are jointly and severally liable to the extent that Defendant SMARTBARGAINS.COM, LP, is liable to Plaintiffs.

REQUEST FOR RELIEF

Plaintiffs demand trial by jury.

Plaintiffs respectfully request the following relief:

1. Entry of a Judgment against Defendants SMARTBARGAINS.COM, LP; JOHN A. KERNEY and his marital community with JANE DOE KERNEY; and ALAN R. GOLDSTEIN and his marital community with JANE DOE GOLDSTEIN, in the amount of $1,100 per E-mail (a total of $4,956,600), plus such other and further damages as may be proved at trial, plus treble damages to the extent permitted by Chapter 19.86 RCW and to the extent permitted by 15 U.S.C. §7706(g)(3)(C), plus prejudgment and postjudgment interest at the highest rate permitted by law, plus costs of suit and reasonable attorney fees pursuant to Chapter 19.86 RCW and 15 U.S.C. §7706(g)(4);

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2. Entry of a permanent injunction against Defendant SMARTBARGAINS.COM, LP, prohibiting said Defendant from sending or causing to be sent electronic mail messages of any kind or nature to e-mail addresses at the Domains; and

3. Such other and further relief as the Court deems just and equitable in the premises.

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DATE: August 9, 2006.

By:________________________

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